In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 315

ANTHONY DE ANGELIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1966. The petition for a writ of certiorari was filed on July 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly sentenced under the provisions of 18 U.S.C. 4208.

STATUTE INVOLVED

Section 4208(b) of Title 18 provides:

> If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

STATEMENT

Petitioner and others were indicted in the District of New Jersey for the interstate transportation of

falsely made and forged securities in the form of warehouse receipts representing soy bean oil valued at millions of dollars, in violation of 18 U.S.C. 2314 (19 counts) (Cr. No. 105-64; R. 4a-15a [1]). Later an information was filed charging a conspiracy between petitioner and Allied Crude Vegetable Oil Refining Corp. to violate 18 U.S.C. 2314 (Cr. No. 4-65; R. 15a-18a), and petitioner waived indictment (R. 3a). Petitioner was represented by counsel at all pertinent times. On January 8, 1965, petitioner pleaded guilty to counts 2, 14 and 15 of the indictment (R. 1a) and to the information (R. 3a). At a sentencing hearing on May 28, 1965, the district judge, desiring "more detailed information as a basis for determining the sentence to be imposed," decided to employ the procedures available under 18 U.S.C. 4208(b) which provide for the preparation of a complete study of the prisoner by the Director of the Bureau of Prisons. The judge said (R. 34a):

> Therefore, in accordance with the provision of Section 4208(b) of Title 18, it is the sentence of this Court that you be committed to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law * * *.
>
> Such is the disposition of the penalty in your case.

The judge then added (R. 34a):

> I might say that this commitment for study is to be considered concurrent—as you were, is to

[1] References are to the appendix to appellant's brief in the court below filed as part of the record in this Court.

be considered for ten years under Section 2314 and five years under Section 371 to run concurrently, the latter to run concurrent with the former.

The formal judgment on the indictment counts under 2314 provided for imprisonment "pursuant to 18 U.S.C. 4208(b) for a study . . ." (R. 35a). The formal judgment on the conspiracy information provided (R. 37a): "This sentence to run concurrent with sentence imposed in Criminal 105-64" (the indictment).

On August 17, 1965, after the completion of the study called for under Section 4208(b), petitioner again appeared for sentencing (R. 39a). The court sentenced petitioner to imprisonment for ten years on Count 2 of the indictment; to five years' imprisonment on the information to run concurrently with Count 2; to ten years' imprisonment on Count 14 of the indictment to run consecutively to the sentence imposed on Count 2, and to ten years' imprisonment on Count 15 of the indictment to run concurrently with the sentence imposed upon Count 14, or an aggregate of twenty years' imprisonment (R. 40a-41a). Counsel for petitioner complained that he understood that the court had originally sentenced petitioner to only "ten years and five years to run concurrently" and moved the court to reduce the aggregate sentence to 10 years (R. 41a-42a). The district judge replied (R. 43a) that Section 4208(b) provides automatically that commitment "[s]hall be deemed to be for the maximum sentence of imprisonment prescribed by law" and that originally the court had "made a reference to the concurrence of a sentence for conspiracy

with a 'sentence for the [substantive] offense." The application for reconsideration and modification of the sentence was denied (R. 42a-43a).

ARGUMENT

Petitioners' contention that the preliminary sentence imposed by the district judge on May 28, 1965, was limited to ten years is based entirely on one ambiguous phrase in the court's eight-page statement. Taken in its entirety, the statement (R. 29a-34a) makes plain that the court intended, pursuant to 18 U.S.C. 4208(b), to "commit the defendant to the custody of the Attorney General" and that such commitment "be deemed to be for the maximum sentence of imprisonment prescribed by law". The court stated (R. 34a):

> In order to evoke, or appropriately utilize the provisions of the statute * * * Section 4208(b) it is necessary that I impose a penalty on each of the counts to which you have pleaded guilty, consisting of the maximum sentence of imprisonment provided by the statute upon which the particular count or counts of the indictment or information were based.
>
> Therefore, in accordance with the provision of Section 4208(b) of Title 18, it is the sentence of this Court that you be committed to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law * * *.

Having thus sentenced petitioner to the maximum sentence on each count, the judge added that the ten

year term under Section 2314 and the five year term under Section 371 were to run concurrently (R. 34a). In so saying, the judge failed to restate that there were three counts under Section 2314 on which petitioner was to be sentenced. From this, petitioner concludes that the judge intended the three ten-year terms under Section 2314 to run concurrently. But the judge's words do not require that conclusion. On the contrary, they refer only to the concurrence of the sentence on the information with the sentence on the indictment and make no reference to the several counts within the indictment. Moreover, the written Judgment and Commitment on the indictment (R. 35a), following form 25 of the Federal Rules of Criminal Procedure, provides "that the defendant is hereby committed * * * for imprisonment for a period of pursuant to 18 U.S.C. 4208(b)"—*i.e.*, "for the maximum sentence of imprisonment prescribed by law" as provided in Section 4208(b). The judgment on the indictment thus says nothing about concurrent terms under the indictment and should reasonably be understood, consistent with the purposes of Section 4208(b), to impose the maximum sentence leaving the judge free to impose any sentence less than the maximum after receiving the study called for. The Judgment and Commitment on the information (R. 37a-38a), on the other hand, provided "that the defendant is hereby committed * * * for imprisonment pursuant to 18 U.S.C. 4208(b) * * *. This sentence to run concurrent with sentence imposed in Criminal 105-64." It seems quite evident, therefore, that the only concurrence of terms intended by the

district judge was between that imposed on the indictment and that imposed on the information, and that in each case the commitment imposed, pending receipt of a report from the Director of the Bureau of Prisons, was to be "deemed to be for the maximum sentence of imprisonment prescribed by law" in accordance with Section 4208(b).

The Court has recently stressed (*United States* v. *Behrens*, 375 U.S. 162, 165) that the preliminary sentencing under Section 4208(b) is a purely tentative, formal matter designed solely to afford an opportunity to obtain a study which will serve as the basis for final sentencing. The Court said in *Behrens* (*ibid.*):

> * * * The use of § 4208(b) *postpones* action as to the final sentence; by using that section the court decides to await studies and reports of a defendant's background, mental and physical health, etc., to assist the judge in making up his mind as to what the final sentence shall be. It is only then that the judge's final words are spoken and that the defendant's punishment is fixed. * * * [Emphasis in original.]

The function of the original sentencing under Section 4208(b) is thus merely to preserve the status quo by the automatic but temporary imposition of the maximum sentence. Thus in *Corey* v. *United States*, 375 U.S. 169, the Court noted that the defendant, upon conviction on a 75 count indictment, was preliminarily deemed to be committed for a term of 375 years (375 U.S. at 171, n.3). In this regard, Section 4208(b) does not appear to vest the trial judge with any

discretion to impose a lesser sentence than the maximum which is deemed to be imposed. And certainly "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner" (*Bozza* v. *United States*, 330 U.S. 160, 166-167). Even if petitioner reasonably misinterpreted the district judge's comments at the hearing on May 28, 1965, no prejudice resulted. The sentence finally imposed on the indictment, following the completion of the study under Section 4208(b), was less than the maximum prescribed by law, and the sentence imposed on the information was made to run concurrently. Petitioner had not lost his right to appeal (*Corey* v. *United States*, *supra*). Under these circumstances, there is no occasion here for further review of the sentence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1966

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 226473 81